

No. 11,628

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EDWARD MILLER,

Appellant,

VS.

BANK OF AMERICA, N. T. & S. A., UNITED
STATES OF AMERICA and GEORGE C. WEL-
DEN, an individual doing business as
Wholesalers Adjustment Bureau of San
Francisco,

Appellees.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

Article III, Section 2, Subdivision 1 of the United States Constitution provides that the judicial power shall extend to controversies to which the United States will be a party. In the matter now on appeal, the United States of America was served and appeared in the proceeding in the District Court of the United States for the Northern District of California, Southern Division.

STATEMENT OF FACTS.

This matter was tried in the District Court upon a stipulation of facts (Transcript of Record, pp. 2-6), and an amended stipulation of facts (Transcript of Record, pp. 7-8).

An action for interpleader was brought by the Bank of America, National Trust and Savings Association, a National Banking Association, against the United States of America and two attaching creditors and the owners of the fund in the bank, namely, Everett and McEachern, individually and as a partnership. (Transcript of Record, pp. 2-3.)

The Bank of America will be referred to hereinafter, for convenience, as the "Bank." The United States of America will be referred to hereinafter as the "Government," and Appellant, Edward Miller will be referred to as "Miller," and defendant in the District Court, George C. Welden, individually and doing business under the firm name and style of Wholesalers Adjustment Bureau of San Francisco, will be referred to as "Welden."

The default of defendants Everett and McEachern was granted on October 15, 1945. (Transcript of Record, p. 3, lines 7, 8 and 9.)

The chronology of events is as follows:

On November 22, 1943, Welden levied an attachment on the funds of Everett and McEachern in the Bank. (Transcript of Record, p. 11, lines 5, 6 and 7.)

The amount on deposit in the Bank in the account of Everett and McEachern was Three Thousand One Hundred Ninety-nine and 59/100ths Dollars (\$3,199.59). (Transcript of Record, p. 10, line 10.)

On January 5, 1944, Miller attached the fund. (Transcript of Record, p. 12, lines 3-5.)

On March 11, 1944, Miller obtained judgment in the Superior Court of the County of Mendocino, in the amount of Five Thousand Fifty-two and 43/100ths Dollars (\$5,052.43), plus attorneys' fees and said judgment was regularly entered March 11, 1944, in Book 21, Page 269 of Judgments in the office of the County Clerk of Mendocino County, California. (Transcript of Record, p. 12, lines 6-13.)

On March 25, 1944, the assessment list was received by the United States Collector of Internal Revenue for Two Thousand Five Hundred Twenty and 75/100ths Dollars (\$2,520.75) withholding tax due from Lyle B. Everett and Joseph L. McEachern to the Government. (Transcript of Record, p. 12, lines 15-26.) On April 11, 1944, the Collector of Internal Revenue received the assessment list showing Six Hundred Twenty-nine and 85/100ths Dollars (\$629.85) due against Everett and McEachern for Social Security taxes. (Transcript of Record, p. 13, lines 4-12.)

On April 21, 1944, at ten minutes past eleven o'clock A. M., a notice of tax lien for the Social Security taxes, in the amount of Six Hundred Sixty-one and 34/100ths Dollars (\$661.34) was filed of record with the County Recorder of Sonoma County, California. (Transcript of Record, p. 13, lines 14-18.)

That on April 21st, 1944, at eleven minutes after eleven o'clock A. M., a notice of tax lien for the Withholding Taxes, in the amount of Two Thousand Six Hundred Twenty and 51/100ths Dollars (\$2620.51)

was filed of record by the Government with the County Recorder of Sonoma County, California. (Transcript of Record, p. 12, line 30, to p. 13, line 3.)

The Bank had its office at Healdsburg, Sonoma County, California, and the fund was located at the office of the Bank at said place. (Transcript of Record, p. 10, lines 8-17.)

On April 21, 1944, the Judgment of Welden was entered in Volume 602, page 419 of the Judgment Book of the Superior Court of the State of California, in and for the City and County of San Francisco, and on April 25, 1944, a Writ of Execution issued under said Judgment, in the amount of Two Thousand Seventy-eight and 36/100ths Dollars (\$2,078.36). (Transcript of Record, page 11, lines 16-22.)

For the convenience of the Court we have set out a schedule of dates which may aid the Court in keeping the order of events clearly in mind:

<u>Date</u>	<u>Welden</u>	<u>Miller</u>	<u>U. S.</u>
Nov. 22, 1943	Attachment Levy		
Jan. 5, 1944		Attachment Levy	
March 11, 1944		Judgment Entered	
March 25, 1944			Assessment List
April 11, 1944			Assessment List
April 21, 1944 (at 10' & 11' after 11:00 a.m.)			Notice Filed
April 21, 1944 (No min. or hour)	Judgment Entered		

STATEMENT OF THE QUESTION.

Is a judgment creditor within the meaning of Section 3672(a) of the Internal Revenue Code, as amended, one who has had a judgment entered but has not levied on the personal property after judgment entered, or must he have made a levy of execution on the property?

SPECIFICATION OF ERRORS.

Appellant excepts to the findings of the District Court contained in Paragraphs 8 and 9 of the Findings of Fact and Conclusions of Law (Transcript of Record, pp. 17-18), and in particular as follows:

1. Wherein the Court finds:

“But that neither said indebtedness nor the judgment obtained thereon constituted, as of April 21, 1944, the date upon which the United States perfected its lien, by recording notices thereof, a lien upon the sum * * *” (Transcript of Record, p. 17, lines 14-18.)

2. And, insofar as it affects appellant Miller, the findings of the Court are as follows:

“That the tax liens of the United States are superior to the rights, claims and liens of each and all of the creditor defendants in and to the fund * * *” (Transcript of Record, page 17, lines 26-28.)

ARGUMENT OF THE CASE.

(a) WHAT IS THE MEANING OF THE WORDS "JUDGMENT CREDITOR" IN SECTION 3672, SUBDIVISION (a)?

The relevant federal tax legislation regarding priority of tax liens is contained in the Internal Revenue Code of the United States, as amended, and is as follows:

Sec. 3670. Property Subject to Lien.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Sec. 3671. Period of Lien.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

Sec. 3672. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors (As amended by § 401, 1939 Act; § 505, 1942 Act.)

(a) Invalidity of Lien Without Notice.—*Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Collector.* (Emphasis ours.)

(1) Under State or territorial laws.—In the office in which the filing of such notice is author-

ized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or * * *

By the act of the Legislature of the State of California, of June 22, 1923, effective August 17, 1923, provision was made by the State of California for the recording of the liens referred to in Section 3672(a). It will also be noted that the notice of liens were filed with the County Recorder of Sonoma County, California. (Transcript of Record, Findings of Fact, paragraph V, pp. 12-13, line 30, p. 12 to line 3, p. 13, and lines 14-17.)

1. A lien upon all real and personal property arises in favor of the United States at the time the assessment list is received by the collector, and is discharged only in favor of certain classes of third parties, among whom are judgment creditors.

In *MacKenzie v. United States of America*, 109 Fed. (2d) 540, the Court said:

“An examination of the legislative history of Section 3186 makes it clear that Congress did so intend. *Prior to the enactment of the amendment in 1913 the Act contained no provision for priority on the part of any third parties.* Decisions under the Act prior to 1913 repeatedly held that no third parties, not even innocent purchasers for value, were protected under any circumstances from an unrecorded tax lien. *United States v. Snyder*, 149 U.S. 210, 13 Sup. Ct. 846. In 1913 Congress added the provision that the tax lien

shall not be valid against ‘any mortgagee, purchaser, or judgment creditor’ until recordation of the notice. Congress at this time undoubtedly recognized that under the statute as it existed prior to 1913 no third person was protected under any circumstances, from an unrecorded federal tax lien. By the 1913 amendment it intended to extend protection, not to all third parties, but to the three classes of third parties designated therein, namely, mortgagees, purchasers and judgment creditors. *We conclude that in order to be protected the claimant must show that he is within one of those three classes.*” (Emphasis ours.)

In *Manufacturers Trust Co. v. Sobel*, 175 Misc. 1067, 26 N. Y. S. (2d) 145, 28 A.F.T.R. 186, the United States contended that a judgment creditor who had not levied against the fund was subordinate to the tax lien, notice of which was subsequently filed with the Clerk. The Court held that a levy of execution under the judgment was not necessary.

The Court said at page 146:

“It is unnecessary to follow the argument, as by a plain reading of the statute a judgment creditor in the circumstances here is placed ahead of the government. The language can have no other meaning * * *”

And at page 147 the Court said:

“No question of strict versus loose construction arises. *Gould v. Gould*, 245 U. S. 151, 38 S. Ct. 53, 63 L. Ed. 211. There is no room for construction as the statute as to these classes of persons is specific.”

In *U. S. v. Record Publishing Co.* (D. C. Calif. 1945) 60 Fed. Supp. 194, the Court held that a judgment creditor that had levied on his judgment was superior to the government liens subsequently filed for record in the county. However, there was no discussion as to the need for a levy.

In *Chalmers and Williams v. Surprise* (1919) 70 Ind. App. 646, 123 N. E. 841 at p. 844, the Court said:

“It should be noted that the terms ‘creditor’, ‘judgment creditor’, and ‘execution creditor’, each have their special meaning * * * A judgment creditor may be said to be one whose claim has been merged into a judgment against his debtor and under which, generally, execution may be had. Anderson’s Dictionary of Law, p. 292 An execution creditor is one, who having recovered a judgment against the debtor for his debt, has also caused an execution to be issued thereon. Black’s Law Dictionary (2d Ed.) p. 297.”

The California Code of Civil Procedure, Section 664 provides with regard to judgments as follows:

“* * * in no case is a judgment effectual for any purpose until entered.”

The appellant became a judgment creditor of Everett and McEachern when his judgment was entered on March 11, 1944, for it was at that date that his status as a creditor merged into a judgment against his debtors. To say that one cannot be a judgment creditor until he has levied on a particular asset of his debtor, is equivalent to saying that a creditor needs

first to hold or seize an asset of his debtor to be classed as a "creditor."

In *Underwood v. U. S.*, Cir. 5, 18 Fed. (2d) 760, the Circuit Court held at page 761 that the tax lien was superior to the lien of an unrecorded Deed of Trust. At page 761 the Court said:

"In a well considered opinion, reviewing Texas and Federal authorities, the District Court held that the United States was a creditor, *that the trust deed was void as to creditors until recorded*, and therefore the tax lien was superior to the unrecorded mortgage lien." (Emphasis ours.)

This case was cited by the District Court in its memorandum decision. (Transcript of Record, page 8, 3rd line from the bottom of the page.)

A reading of *Underwood v. U. S.*, 37 Fed. Supp. 824, the same case in the District Court shows the basis of the Circuit Court's decision. The District Court said:

"Article 6627 of the Revised Civil Statutes of Texas for 1925 provides in part as follows: 'All bargains, sales, and other conveyances whatever, of any land * * * and all *Deeds of Trust and Mortgages shall be void, as to all creditors* * * * unless they shall be acknowledged or proved and filed with the Clerk to be recorded as required by law.' " (Emphasis ours.)

and at page 826 the Court said:

"*The Texas Statute makes absolutely void an unrecorded Deed of Trust as to creditors.* The United States was a creditor of the taxpayer within the purview of the Texas statute. (Emphasis ours.)

SUMMARY.

Before 1913 the Government had a lien as against all property of a taxpayer from the time its assessment list was received by the collector. Thereafter, Congress saw fit to create a condition subsequent wherein certain classes of persons were given priority over the lien of the government unless the government, prior to the creation of their status as one of the class, had filed notice of its lien in the place authorized by State or Territorial laws.

In this case appellant's judgment was entered March 11, 1944. The plain meaning of the words "judgment creditor" must mean a creditor whose claim is reduced to judgment. There is no authority known to this writer which holds that a judgment creditor within the meaning of Section 3672(a) requires anything more than the entry of the judgment. There is authority that the language has no further meaning than that a creditor who merely reduces his claim to judgment comes within the protection of Section 3672(a).

Dated, Berkeley, California,
July 28, 1947.

Respectfully submitted,

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